

*\*E-FILED - 7/14/09\**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DAVID GUTIERREZ, ) No. C 07-03668 RMW (PR)  
Petitioner, ) ORDER DENYING PETITION FOR  
vs. ) WRIT OF HABEAS CORPUS  
JAMES A. YATES, Warden, )  
Respondent. )

Petitioner, a California prisoner proceeding pro se, filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent filed an answer and a supporting memorandum of points and authorities addressing the merits of the petition. Petitioner filed a traverse. Having reviewed the papers and the underlying record, the court concludes that petitioner is not entitled to habeas corpus relief and will deny the petition.

## **PROCEDURAL BACKGROUND**

On November 23, 2004, a Santa Clara Superior Court jury convicted petitioner of carjacking pursuant to California Penal Code § 215 and assault with a deadly weapon pursuant to Penal Code § 245(a)(1), with various enhancements. Further, the court found a prior conviction enhancement to be true. On February 17, 2005, petitioner was

1 sentenced to a term of twenty-six years in prison.

2 Petitioner appealed the judgment. The state appellate court affirmed the judgment  
 3 in a reasoned opinion on November 20, 2006. The state supreme court summarily denied  
 4 a petition for review on February 7, 2007. Petitioner filed the instant federal habeas  
 5 petition on July 17, 2007.

## 6 FACTUAL BACKGROUND

7 Petitioner does not dispute the following facts, which are taken from the  
 8 unpublished opinion of the California Court of Appeal<sup>1</sup>:

9 Anthony Lionetti was driving a cab in the early morning of January 7,  
 10 2004, when he was flagged down by a Hispanic male who appeared unshaven  
 11 and in his late 20s. The man asked Lionetti to drive him to a particular  
 12 intersection, but when they arrived there the man asked him to drive to  
 13 Virginia Street. Recognizing it as a dead-end street, Lionetti became nervous  
 14 and stopped the car in front of a house. The passenger got out of the cab and  
 15 urinated against a tree. Lionetti got out, approached the man, and asked for  
 his fare, which was about \$18 or \$19. The next thing Lionetti remembered,  
 he was on the ground. The passenger had gotten into the cab and [driven it  
 over] Lionetti . . . . Lionetti called his dispatcher in a scared voice, saying he  
 was in trouble and needed police and an ambulance. The dispatcher heard a  
 thump, probably from Lionetti being hit by the car a second time, and the  
 phone went dead.

16 The dispatcher called 911. Police officers arrived at the scene to find  
 17 Lionetti face down in the street. He was awake but in pain, and very upset  
 18 about the taking of the cab. He coherently described what had happened,  
 including the passenger's description and his use of the name "Mike." He  
 19 said that the passenger had displayed a folding knife when Lionetti demanded  
 his fare. The empty cab was found about a block away. Fingerprints later  
 lifted from it did not match [petitioner], Lionetti, or several police officers.

20 [Petitioner]'s sister, Denise Garduno, testified that on the morning of  
 21 January 7, 2004, she was visiting another brother at his apartment on Virginia  
 22 Street when [petitioner] showed up looking for a place to stay. When told  
 23 that he could not stay there, he became angry and upset, pulling out a folding  
 24 knife and holding it in his hand. Ms. Garduno called 911 because she was  
 25 concerned that someone might get hurt. While she and [petitioner] were  
 outside the building there was a commotion with ambulances and sirens at the  
 corner. [Petitioner] seemed nervous when a police car went by. Ms.  
 Garduno did not recall telling police that [petitioner] had hidden behind a car,  
 but testified that he went behind a car and might have tripped. She said she  
 was afraid that the police might harass [petitioner] and beat him again.

26 Officer Vaughn went to the area in question in response to Ms.

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 28 <sup>1</sup> People v. Gutierrez, No. H028515 (November 20, 2006) (Resp't Ex. F at 2-3).

Garduno's 911 call. [Petitioner] was taken into custody, transported to the hospital, and displayed to Lionetti, who promptly identified him as his assailant. Later that morning Lionetti told the operations manager for the cab company what had happened, and that he was sure the guy police had brought to the hospital was the perpetrator.

In late January or early February, Lionetti developed medical complications, in response to which doctors placed him into a drug-induced coma for three months. When he regained consciousness his memory of the events in the hospital was impaired. At trial he was unable to identify [petitioner] as his assailant, but testified that he remembered police bringing the assailant to the hospital and that he then identified that person as the perpetrator.

## LEGAL CLAIMS

Petitioner asserts the following claims for habeas relief<sup>2</sup>: (1) petitioner's federal constitutional right to confront witnesses against him was violated when the trial court allowed testimony that the victim had identified petitioner in person soon after the incident, but was later unable to identify petitioner at trial due to memory loss; (2) petitioner's federal constitutional right to due process was violated when the trial court excluded evidence which provided an alternative reason for petitioner avoiding contact with the police on January 7, 2004; and (3) the cumulative errors were prejudicial.

## DISCUSSION

### A. Standard of Review

Because the instant petition was filed after April 24, 1996, it is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes significant restrictions on the scope of federal habeas corpus proceedings. Under AEDPA, a federal court may not grant habeas relief with respect to a state court proceeding unless the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the

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<sup>2</sup> Petitioner appears to raise the following new claims in his traverse: (1) denial of the right to present a defense because Lionetti's nurse did not testify at trial on petitioner's behalf; and (2) violation of due process by the hospital "show-up" identification procedure. However, "[a] traverse is not the proper pleading to raise additional grounds for relief." See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). Accordingly, this court will not address these claims.

1 United States,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination  
 2 of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. §  
 3 2254(d)(2).

4       “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the  
 5 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a  
 6 question of law or if the state court decides a case differently than [the] Court has on a set  
 7 of materially indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-13  
 8 (2000). “Under the ‘unreasonable application clause,’ a federal habeas court may grant  
 9 the writ if the state court identifies the correct governing legal principle from [the] Court’s  
 10 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id.  
 11 “[A] federal habeas court may not issue the writ simply because the court concludes in its  
 12 independent judgment that the relevant state-court decision applied clearly established  
 13 federal law erroneously or incorrectly. Rather, that application must also be  
 14 unreasonable.” Id. at 411.

15        “[A] federal habeas court making the ‘unreasonable application’ inquiry should ask  
 16 whether the state court’s application of clearly established federal law was ‘objectively  
 17 unreasonable.’” Id. at 409. In examining whether the state court decision was objectively  
 18 unreasonable, the inquiry may require analysis of the state court’s method as well as its  
 19 result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The “objectively  
 20 unreasonable” standard does not equate to “clear error” because “[t]hese two standards . . .  
 21 . are not the same. The gloss of clear error fails to give proper deference to state courts by  
 22 conflating error (even clear error) with unreasonableness.” Lockyer v. Andrade, 538 U.S.  
 23 63, 75 (2003).

24        A federal habeas court may grant the writ if it concludes that the state court’s  
 25 adjudication of the claim “resulted in a decision that was based on an unreasonable  
 26 determination of the facts in light of the evidence presented in the State court  
 27 proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any determination  
 28 of a factual issue made by a state court unless the petitioner rebuts the presumption of

1 correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

2 **B. Analysis of Legal Claims**

3       1. Confrontation Clause Violation

4 Petitioner claims that his Sixth Amendment right to confront witnesses against him  
 5 was violated because the trial court admitted testimony concerning Lionetti's hospital  
 6 identification of petitioner as the perpetrator. (Pet. at 15.) Before trial, petitioner objected  
 7 to the admission of the hospital identification as impermissible hearsay. (Resp't Ex. B at  
 8 20-25.) The district attorney had sought to admit the hospital identification because the  
 9 victim had an insufficient recollection of the incident to identify petitioner at trial.  
 10 (Resp't Ex. F at 3.) The trial court overruled the objection to the use of the evidence  
 11 pursuant to Cal. Evidence Code § 1237. (Resp't Ex. B at 25.)

12       The Confrontation Clause of the Sixth Amendment provides that in criminal cases  
 13 the accused has the right to "be confronted with witnesses against him." U.S. Const.  
 14 amend. VI. The federal confrontation right applies to the states through the Fourteenth  
 15 Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). A primary interest secured by  
 16 the Confrontation Clause is the right of cross-examination. See Davis v. Alaska, 415 U.S.  
 17 308, 315-16 (1974). However, "the confrontation clause guarantees only 'an opportunity  
 18 for effective cross-examination, not cross-examination that is effective in whatever way,  
 19 and to whatever extent, the defense might wish.'" United States v. Owens, 484 U.S. 554,  
 20 559 (1988) (emphasis in original) (quoting Kentucky v. Sincer, 482 U.S. 730, 739  
 21 (1987)).

22       The Confrontation Clause applies to all "testimonial" statements. See Crawford v.  
 23 Washington, 541 U.S. 36, 50-51 (2004). "Testimony . . . is typically a solemn declaration  
 24 or affirmation made for the purpose of establishing or proving some fact." Id. at 51  
 25 (citations and quotation marks omitted). The Confrontation Clause applies not only to in-  
 26 court testimony but also to out-of-court statements introduced at trial, i.e., "testimonial  
 27 hearsay," regardless of the admissibility of the statements under state laws of evidence.  
 28 Id. at 50-51. Out-of-court statements by witnesses that are testimonial hearsay are barred

1 under the Confrontation Clause unless (1) the witnesses are unavailable, and (2) the  
 2 defendants had a prior opportunity to cross-examine the witnesses. *Id.* at 59. However,  
 3 the Confrontation Clause does not bar the admission of testimonial hearsay when the  
 4 declarant appears for cross-examination at trial. *Id.* at 59 n.9 (citing California v. Green,  
 5 399 U.S. 149, 162 (1970)). Furthermore, the Confrontation Clause is not violated by the  
 6 admission of a prior identification by a witness who is unable, because of memory loss, to  
 7 testify concerning the basis for the identification. Felix v. Mayle, 379 F.3d 612, 617-18  
 8 (9th Cir. 2004) (citing Owens, 484 U.S. at 564).

9       The state appellate court applied Crawford and assumed that Lionetti's statement  
 10 was testimonial, but concluded that exclusion of the statement was not warranted under  
 11 the Confrontation Clause because Lionetti was available for, and subjected to, cross-  
 12 examination at trial. (Resp't Ex. F at 4-5.)

13       Next, the state court rejected petitioner's argument that the Confrontation Clause  
 14 mandates that "the state of [the witness'] memory is such that the defendant is able to  
 15 'engage in meaningful cross-examination.'" (*Id.* (italics omitted).) The court found that  
 16 petitioner's case was factually similar to Owens, which held that the Confrontation Clause  
 17 does not require exclusion of pretrial statements concerning matters the declarant no  
 18 longer recalls at trial. (*Id.* at 6.) Accordingly, the court concluded that "because the state  
 19 made the declarant available for, and did nothing to impede, [petitioner]'s cross-  
 20 examination of the witness," the trial court did not err in admitting Lionetti's hospital  
 21 identification.

22       This court finds that the state court's decision was neither contrary to nor an  
 23 unreasonable application of clearly established federal law, nor was it an unreasonable  
 24 determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d).  
 25 Whether or not Lionetti's hospital statement was testimonial, it was admissible under the  
 26 Confrontation Clause since Lionetti appeared for cross-examination at trial. See Green,  
 27 399 U.S. at 162. Moreover, this court also agrees that the facts of the instant case are  
 28 similar to Owens. As in Owens, Lionetti was unable to remember his assailant when he

1 testified during trial, but he did remember making a positive identification at the hospital.  
 2 See Owens, 484 U.S. at 556. Therefore, under these circumstances, the admission of  
 3 Lionetti's hospital identification did not amount to a Sixth Amendment violation. See id.  
 4 at 564.

5 Even if this court found that the statement was a violation, the error was harmless.  
 6 See United States v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004) (finding that  
 7 Confrontation Clause claims are subject to harmless error analysis); see also United States  
 8 v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005). For purposes of federal habeas corpus  
 9 review, the standard applicable to violations of the Confrontation Clause is whether the  
 10 inadmissible evidence had an actual and prejudicial effect upon the jury. See Hernandez  
 11 v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing Brech v. Abrahamson, 507 U.S.  
 12 619, 637 (1993)).

13 In the instant case, there was independent and credible evidence that petitioner was  
 14 identified by Lionetti. While in the hospital, Lionetti told David Logan, a manager of the  
 15 cab company, about the carjacking incident and how he had identified the man the police  
 16 brought to the hospital as his assailant. (Resp't Ex. F at 3.) Petitioner argues that this  
 17 conversation was "testimonial," and thus subject to the Confrontation Clause, because (1)  
 18 it can be considered a continuation of his statement to the police because it occurred  
 19 shortly after the show-up; or (2) it was a formal statement by an employee to an employer  
 20 rather than a casual remark to an acquaintance. (Pet. at 16-17.) The appellate court did  
 21 not address this issue. (Resp't Ex. F at 5 n.2.)

22 This court finds that both of petitioner's arguments are without merit. In Crawford,  
 23 the Supreme Court declined to provide a specific definition of "testimonial." Crawford,  
 24 541 U.S. at 68. However, the Court did set a minimum as to what qualifies as a  
 25 "testimonial" statement: (1) prior testimony at a preliminary hearing, before a grand jury,  
 26 or at a formal trial; and (2) police interrogations. Id. It is clear from the record that  
 27 Lionetti's statement to Logan does not rise to the level of a "testimonial" statement  
 28 because it occurred in a hospital (rather than some sort of adversarial judicial proceeding)

1 and in the absence of police officers. Therefore, Lionetti's statement to Logan was non-  
 2 testimonial, and not subject to Confrontation Clause scrutiny. See id. Rather, the  
 3 admissibility of the statement was properly determined by state evidentiary rules. See id.  
 4 This court concludes that for purposes of federal habeas review, the admission of the  
 5 hospital identification did not have an actual and prejudicial effect on the jury because the  
 6 statement to Logan was admissible under state law. See Brecht, 507 U.S. at 637.  
 7 Accordingly, petitioner is not entitled to federal habeas relief on this claim.

8       2.     Exclusion of Evidence Countering Consciousness-of-Guilt Evidence

9       Petitioner claims that his right to due process was violated because the trial court  
 10 excluded evidence that provided an alternative reason for petitioner attempting to avoid  
 11 contact with the police on January 7, 2004. (Pet. at 23.)

12       During trial, the prosecution offered evidence demonstrating that petitioner had  
 13 exhibited consciousness of guilt on the morning of January 7, 2004. (Resp't Ex. F at 10.)  
 14 Petitioner's sister, Denise Garduno, had made statements and given testimony to the  
 15 effect that "there was a commotion that morning with sirens and ambulances, and that  
 16 when a police car went by [petitioner] appeared nervous and ducked, hid, went, or  
 17 perhaps tripped behind a parked car." (Id.) In order to rebut the inference of  
 18 consciousness of guilt, defense counsel had sought to admit testimony by Garduno  
 19 regarding whether she knew of any other reason petitioner might have wanted to avoid  
 20 police contact. (Id.) The prosecution objected and the trial court found the evidence  
 21 speculative, sustaining the objection under California Evidence Code § 352, which grants  
 22 the trial judge broad discretion to exclude evidence where the probative value is  
 23 outweighed by the potential for wasting time, confusing the jury, or otherwise interfering  
 24 with a fair and efficient trial of the facts. (Id.) Petitioner asserts that Garduno would have  
 25 testified that petitioner's reason for wanting to avoid police was that he had been beaten  
 26 by police six months earlier. (Pet. at 23.)

27       "State and federal rulemakers have broad latitude under the Constitution to  
 28 establish rules excluding evidence from criminal trials." Holmes v. South Carolina,

1 547 U.S. 319, 324 (2006) (quotations and citations omitted); see also Montana v.  
 2 Egelhoff, 518 U.S. 37, 42 (1996) (holding that due process does not guarantee a defendant  
 3 the right to present all relevant evidence). This latitude is limited, however, by a  
 4 defendant's constitutional rights to due process and to present a defense, rights originating  
 5 in the Sixth and Fourteenth Amendments. See Holmes, 547 U.S. at 324. "While the  
 6 Constitution prohibits the exclusion of defense evidence under rules that serve no  
 7 legitimate purpose or that are disproportionate to the ends that they are asserted to  
 8 promote, well-established rules of evidence permit trial judges to exclude evidence if its  
 9 probative value is outweighed by certain other factors such as unfair prejudice, confusion  
 10 of the issues, or potential to mislead the jury." Id. at 325-26; see Egelhoff,  
 11 518 U.S. at 42 (holding that the exclusion of evidence does not violate the Due Process  
 12 Clause unless "it offends some principle of justice so rooted in the traditions and  
 13 conscience of our people as to be ranked as fundamental"). The defendant, not the state,  
 14 bears the burden to demonstrate that the principle violated by the evidentiary rule "is so  
 15 rooted in the traditions and conscience of our people as to be ranked as fundamental." Id.  
 16 at 47 (internal quotations and citations omitted).

17 In deciding if the exclusion of evidence violates the due process right to a fair trial  
 18 or the right to present a defense, the court balances the following five factors: (1) the  
 19 probative value of the excluded evidence on the central issue; (2) its reliability; (3)  
 20 whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence  
 21 on the issue or merely cumulative; and (5) whether it constitutes a major part of the  
 22 attempted defense. Chia v. Cambra, 360 F.3d 997, 1004 (9th Cir. 2004) (citing Miller v.  
 23 Stagner, 757 F.2d 988, 994 (9th Cir. 1985)). Moreover, the excluded evidence must be so  
 24 critical to the issue of guilt or innocence that its exclusion violates due process. Perry v.  
 25 Rushen, 713 F.2d 1447, 1455 (9th Cir. 1983). The court must also give due weight to the  
 26 state interests underlying the state evidentiary rules on which the exclusion was based.  
 27 Chia, 360 F.3d at 1006; Miller, 757 F.2d at 995.

28 The state appellate court concluded that the trial court's exclusion of Garduno's

1 testimony regarding petitioner's reason for avoiding police was not erroneous because of  
 2 the speculative nature of the testimony and its potential for misleading the jury. (Resp't  
 3 Ex. F at 11-12.)

4 This court finds that, under the applicable Miller factors, the state court's decision  
 5 was neither contrary to nor an unreasonable application of clearly established federal law,  
 6 nor was it an unreasonable determination of the facts in light of the evidence presented.  
 7 See 28 U.S.C. § 2254(d). Beginning with the factors that favor petitioner, the third factor  
 8 - whether the evidence is capable of evaluation by the trier of fact - weighs for petitioner  
 9 since the jury could have heard Garduno's testimony and the prosecution would have had  
 10 an opportunity to cross-examine her. The fourth factor - whether the statement is the sole  
 11 evidence on the issue or merely cumulative - also weighs in favor of petitioner because  
 12 Garduno's testimony would be the sole evidence presented to rebut the prosecution's  
 13 inference of consciousness of guilt. These two factors, however, are outweighed by the  
 14 remaining three factors. The first factor, the probative value of the excluded evidence,  
 15 weighs against petitioner because Garduno's testimony was not closely connected to the  
 16 central issue of whether petitioner committed the carjacking. The second factor -  
 17 reliability - weighs against petitioner because Garduno's opinion on why petitioner was  
 18 avoiding the police would have been speculative, and was not supported by any other  
 19 probative evidence. The fifth factor also weighs against petitioner because Garduno's  
 20 testimony would not have been a major part of his defense, since Garduno was not a  
 21 witness to the carjacking and her testimony alone would not have exonerated petitioner.  
 22 Although quantitatively the balancing of interests may seem close, qualitatively the  
 23 factors weigh heavily against petitioner. In sum, petitioner's proffered evidence, based on  
 24 its lack of probity and its tendency to confuse the jury, was not closely connected to the  
 25 issue of his guilt or innocence and falls short of the critical and reliable evidence that if  
 26 excluded would violate due process. See Perry, 713 F.2d at 1455.

27 Moreover, the alleged error was of the type "which in the setting of a particular  
 28 case are so unimportant and insignificant that they may, consistent with the Federal

1 Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”  
 2 Chapman v. California, 386 U.S. 18, 22 (1967). A habeas petitioner is not entitled to  
 3 relief unless the trial error “had substantial and injurious effect or influence in  
 4 determining the jury’s verdict.”” Brecht, 507 U.S. at 637. In other words, state prisoners  
 5 seeking federal habeas relief may obtain plenary review of constitutional claims of trial  
 6 error, but are not entitled to habeas relief unless the error resulted in “actual prejudice.”  
 7 Id. If the court is convinced that the error did not influence the jury, or had but very slight  
 8 effect, the verdict and the judgment should stand. O’Neal v. McAninch, 513 U.S. 432,  
 9 437 (1995). Even with Garduno’s testimony rebutting consciousness of guilt, the evidence  
 10 against petitioner was substantial. In particular, Lionetti identified petitioner as the  
 11 perpetrator, and he also confided in Logan that the police had brought in his assailant.  
 12 Further, although defense counsel was prevented from questioning Garduno about  
 13 petitioner’s reasons for avoiding the police, on redirect examination the prosecutor  
 14 actually elicited testimony from her that petitioner had been harassed and beaten by police  
 15 in the past, thus establishing the exact inference defense counsel was seeking. (Resp’t Ex.  
 16 F at 11.) Therefore, even if exclusion of the evidence was erroneous, it cannot be said  
 17 that the error had a substantial and injurious effect on the jury’s verdict. See Brecht, 507  
 18 U.S. at 637. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

19       3.     Cumulative Errors Were Prejudicial

20 Petitioner claims that the cumulative constitutional errors in the previous claims  
 21 were prejudicial and deprived him of due process and the right to a fair trial. (Pet. at 27-  
 22 28.) The state appellate court did not specifically address this claim because it found no  
 23 reversible error by the trial court. (Resp’t Ex. F at 1.)

24       As previously demonstrated, this court found that the state court properly rejected  
 25 petitioner’s first two claims, and even if there were errors, they were harmless.  
 26 Accordingly, petitioner is not entitled to federal habeas relief on this claim.

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## CONCLUSION

For the reasons set forth above, the court concludes that petitioner has failed to show any violation of his federal constitutional rights in the underlying state criminal proceedings. Accordingly, the petition for writ of habeas corpus is DENIED. The clerk shall terminate all pending motions and close the file.

IT IS SO ORDERED.

DATED: 7/14/09

Ronald M. Whyte  
RONALD M. WHYTE  
United States District Judge